



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 8, 2005

Mr. Todd E. Fitts
Attorney at Law
P.O. Box 910
Marshall, Texas 75671

OR2005-05029

Dear Mr. Fitts:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 224728.

The City of Marshall (the "city"), which you represent, received a request for a specified "water use/supply related study." You claim that the requested information is excepted from disclosure under sections 552.103, 552.105, 552.107, and 552.111 of the Government Code and privileged under Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted information.¹

Initially, we note that the requested information is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

¹Pursuant to section 552.303(c) of the Government Code, on May 26, 2005, this office sent a notice to you via facsimile requesting that you provide additional information necessary for this office to render a decision. We received your response on June 3, 2005. Thus, we will address your additional comments.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information consists of a completed report. You argue, however, that the submitted report was not made of, for, or by the city. You state that "[t]he city authorized its outside counsel to engage an engineering firm, HDR Engineering, Inc. ('HDR')" to analyze issues related to the city's water right in anticipation of "contested case proceedings." The result of HDR's investigation is the report at issue. Because the city authorized hiring HDR to analyze water issues, we conclude that the report was made for the city. Thus, as prescribed by section 552.022, the city must release the report unless it is confidential under other law. Sections 552.103, 552.105, 552.107 and 552.111 of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interests and are therefore not other laws that make information expressly confidential for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 (2002) (governmental body may waive section 552.107), 665 at 2 n.5 (2000) (discretionary exceptions generally), 564 (1990) (governmental body may waive statutory predecessor to section 552.105). The Texas Supreme Court, however, has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your arguments under Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure.

Rule 503 provides in relevant part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the submitted report is a confidential communication between the city’s outside legal counsel and an engineering firm hired by the city’s outside legal counsel for the purpose of rendering legal services regarding the city’s water right.² *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied). While you acknowledge that the report was briefly referenced at a city commission meeting, you claim that a “significant portion” of the report was not disclosed; thus, you argue that such a disclosure does not constitute a waiver of the attorney-client privilege under Rule 511 of the Texas Rules of Evidence. Under Rule 511(1), a privilege is waived if the holder of the privilege “voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged.” TEX. R. EVID. 511(1). Thus, the voluntary disclosure of a “significant part” of privileged information results in an implied waiver of additional information that was not disclosed. *See Terrell State Hosp. of Tex. Dept. of Mental Health & Mental Retardation v. Ashworth*, 794 S.W.2d 937 (Tex. App.—Dallas 1990, writ denied).

In this instance, you inform us that the chairman of the city commission, citing the report, stated that “the [c]ity will need approximately 6,000 acre-feet of additional water to insure full future use of the [c]ity’s existing water rights under worst case drought scenarios,” and that this additional water should be obtained from the Northeast Texas Municipal Water District. You also state that “the results of the historical analyses, the other alternatives mentioned in the Study, the costs of those alternatives, or the legal advice and opinions

²See Tex. R. Evid. 503(a)(2) (defining “representative of the client” as person having authority to obtain legal services or to act on legal advice on behalf of client, or person who for purpose of effectuating legal representation makes or receives a confidential communication while acting in scope of employment for client).

contained in the Study” were not disclosed at the meeting. Furthermore, you assert that the meeting at issue was the only incident where the report was cited or referenced and that the report has otherwise remained confidential. Based on your representations and our review of the submitted information, we find that the information that was disclosed at the commission meeting does not constitute a “significant part” of the report. *See In re Monsanto Co.*, 998 S.W.2d 917 (Tex. App.—Waco 1999). We therefore conclude the city may withhold the submitted report pursuant to Rule 503 of the Texas Rules of Evidence.³

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep’t of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

³As our ruling is dispositive, we need not address remaining claim against disclosure.

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'Caroline E. Cho', written in a cursive style.

Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 224728

Enc. Submitted documents

c: Mr. Henry Bradbury
801 West Pinecrest Drive
Marshall, Texas 75670
(w/o enclosures)